STATE OF MICHIGAN
IN THE SUPREME COURT

JOHANNA WOODARD, Individually and as Next Friend of AUSTIN D. WOODARD a Minor, and STEVEN WOODARD,

Plaintiffs-Appellees,

-vs-

JOSEPH R. CUSTER, M.D.,

Defendant-Appellant,

and

MICHAEL K. LIPSCOMB, M.D., MICHELLE M. NYPAVER, M.D. and MONA M. RISKALLA, M.D.,

Defendants.

Supreme Court No.:

Court of Appeals No.: 239868
Washtenaw County Circuit Court
Case No.: 99 5364 NH

JOHANNA WOODARD, Individually and as Next Friend of AUSTIN D. WOODARD, a Minor, and STEVEN WOODARD,

Plaintiffs-Appellees,

-vs-

UNIVERSITY OF MICHIGAN MEDICAL CENTER,

Defendant-Appellant.

Supreme Court No.:

Court of Appeals: 239869
Court of Claims: 99-017432 CM

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DEFENDANTS-APPELLANTS' APPLICATION FOR LEAVE TO APPEAL

NOTICE OF HEARING

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OPINIONS AND ORDERS BEING APPEALED FROM AND RELIEF SOUGHT

Defendants-Appellants, Joseph R. Custer, M.D. and University of Michigan Medical Center , seeks leave to appeal from the Michigan Court of Appeals' decision dated October 21, 2003. A copy of that Opinion is attached hereto as Exhibit U. Defendants-Appellants request that this Court grant their Application for Leave to Appeal and give full consideration to the legal issues presented herein. Or in the alternative, enter its Order reversing the decision of the Court of Appeals to remand this case for trial, and reinstate the Washtenaw County Circuit Courts grant of Summary Disposition.

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STATEMENT OF QUESTIONS INVOLVED

I. PLAINTIFFS CLAIM THAT THE DIAGNOSIS OF FEMUR FRACTURES DURING AUSTIN WOODARD'S ADMISSION TO MOTT CHILDRENS' HOSPITAL SHOULD GIVE RISE TO AN INFERENCE OF NEGLIGENCE. PLAINTIFFS HAVE NO PROOFS INDICATING THAT THE FRACTURES WERE THE RESULT OF ANY ACT OR OMMISSION ON THE PART OF DEFENDANTS, NOR ANY EXPERT TESTIMONY THAT SUCH INJURIES DO NOT OCCUR IN THE ABSENCE OF NEGLIGENCE. DOES THE MERE EXISTENCE OF AN ALLEGED INJURY GIVE RISE TO AN INFERENCE OF NEGLIGENCE?

Plaintiffs-Appellants says "Yes"

Defendants-Appellees say "No"

The Trial Court said "No"

Court of Appeals Judge Michael Talbot said "No"

Court of Appeals Judge Stephen Borrello said "Yes"

Court of Appeals Judge Patrick Meter said "Yes"

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STATEMENT OF NEED FOR SUPREME COURT REVIEW

Stated bluntly, the hybrid-decision of the Court of Appeals below is a legal embarrassment. In his opinion, Judge Michael Talbot set forth both an accurate (and unusually detailed) recitation of the record, and a thoughtful and entirely correct legal analysis that affirmed the decision of Washtenaw County Circuit Court Judge Timothy Connors granting summary disposition. Judge Borrello's opinion, on the other hand, is riddled with factual statements which are entirely contradicted by the record, and conclusions of law that betray either an indifference to the law as stated previously by this Court and the Court of Appeals, or an ignorance as to what that law is. Judge Meter's "opinion" simply sided with Judge Talbot on the expert witness issue, and with Judge Borrello on res ipsa, without any reasoning or analysis to support his decision.

Members of the bar who follow decisions of the Court of Appeals, whether published or not, are left scratching their collective heads, and many who follow malpractice law are dumbfounded. This ruling, on scrutiny, is a disgrace. One member of the panel provided a model of careful appellate review of the record and legal reasoning. Another indulged in interesting though completely out-of-context references to Thomas Jefferson and Thomas Paine, admonished the Michigan Legislature that it had no business legislating regarding expert testimony in medical malpractice cases (contrary to recent decisions by this Court), and finally stated that Michigan appellate courts have an historic hostility to expert testimony, such that this case should go to the jury without it. Another member of the panel

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signed on to the later portion of that astounding opinion. Clearly, appellate correction by this Court is warranted pursuant to MCR 7.302(B)(5).

Because two member of the panel below affirmed the ruling that plaintiff's expert (a part-time physician and full-time personal injury lawyer) was unqualified to testify regarding pediatric standard of practice, this appeal concerns the proper application of the doctrine of res ipsa loquitur in the law of medical malpractice. At first blush, reviewing the decision below, the reaction may be to think that res ipsa is well defined in the law, and that it was simply either misapplied, or misunderstood, by Judge Borrello (and Judge Meter, who merely stated that plaintiff had shown facts permitting the case to go to a jury, with a res ipsa instruction, without expert testimony). There is merit to this view, when the record is scrutinized; there was more than ample appellate direction for Judge Connors to conclude that, absent any expert testimony, this case could not properly go to the jury under any circumstances, let alone with an instruction to the jury that it could "infer" negligence regarding issues of pediatric intensive care medicine.

Still, scholarly review of the law nation-wide demonstrates that this Court has visited the applicability of res ipsa loquitur less frequently, in this context, than have the highest courts in other states. Moreover, it occurs frequently that claimants assert that their burden of proof should be jettisoned by recourse to the doctrine of res ipsa. Although the trial court in this case was unwilling to agree to this false analysis, two of the opinions by members of the Court of Appeals below demonstrated an alarming lack of clarity on this issue, and it is certain that this decision, though unpublished, will be cited in Circuit Courts throughout the state for the proposition that the jury instruction on res ipsa loquitur should be given in all

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manner of cases. Further elucidation on the applicability of res ipsa in malpractice law by this Court is warranted, and the requirements for granting leave on full calendar appeal under MCR 7.3.302(B)(3) are therefore met.

Should this Court take a contrary view, that a definitive opinion by this Court is not necessary, defendants request that this Court otherwise correct the miscarriage of justice below. Although the doctrine of res ipsa loquitur certainly has application in medical malpractice cases (though limited), a review of the record below demonstrates beyond doubt that this case is decidedly not one of them. As the brief submitted by defendants shows, Judge Borrello misstated the facts of this case in his opinion (as review of Judge Talbot's opinion and the underlying record confirms this). The misstated facts were marshaled in support of the opinion that this case should go to a jury on the issue of res ipsa; this Court should not allow this case to be remanded for trial under these circumstances. MCR 8.302(B)(5).

Defendants request, should this Court deny leave, that this Court, in lieu of granting leave to appeal, reverse the decision of the Court of Appeals and remand with instructions to reinstate the Washtenaw County Circuit Court's grant of summary disposition in favor of the defendants.

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STATEMENT OF FACTS AND MATERIAL PROCEEDINGS

Introduction

These consolidated medical malpractice actions concern care and treatment rendered at Mott Children's Hospital between 1/30/97 and 2/28/97 to 15-day-old Austin Woodard, a critically ill child with respiratory syncytial virus (RSV). RSV bronchiolitis is a life-threatening respiratory disease that attacks infants, with varying degrees of severity, usually in the winter months. The RSV virus attacked Austin Woodard severely; he was dangerously hypoxic on the date of his admission. To save his life, Austin required pediatric intensive care treatment, including intubation, ventilatory support and placement of a feeding tube. He also required placement of an arterial line in his right femoral vein (in the lower extremity, for obtaining frequent samples of blood to monitor oxygenation status), and a left venous catheter (to assure a dependable route for administration of medications). During Austin's stay in the Pediatric Intensive Care Unit (PICU), it was diagnosed that Austin Woodard had bilateral femur fractures.

Plaintiffs, in their trial court pleadings, surmised and speculated, absent any proofs, that the bilateral fractures ***might*** have occurred during the placement of these lines, or during intubation. They sought to offer in the trial court the testimony of a purported "expert", a part-time practicing physician and full-time plaintiff's personal injury attorney, who during the applicable time practiced general pediatrics (without a whit of training or experience in intensive care medicine), to suggest that the fractures may have occurred due to negligence on the part of the pediatric intensive care staff, for

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whose conduct the attending pediatric intensive care physician, Dr. Joseph Custer (the Director of Mott Children's Hospital's PICU), is allegedly responsible).

Plaintiffs also argued, for the first time a few months before trial, the doctrine of res ipsa loquitur should permit, under these facts, a "presumption" of negligence, and that a jury should be permitted to conclude, without any expert testimony, that the PICU care rendered in this case resulted in bilateral hip fractures. These arguments were dismissed by the trial court, which determined that issues related to the treatment of critically ill infants in a pediatric intensive care unit are ones that require expert testimony for the benefit of the jury, and that plaintiffs' proffered expert, Dr. Casamassima, was woefully unqualified to address those issues.

Plaintiffs appealed, and three separate opinions were rendered by the appellate panel. Judges Michael Talbot and Patrick Meter agreed with the trial court that plaintiffs expert was unqualified to testify under MCL 600.2169. Judge Meter and Judge Stephen Borrello took the view that this medical malpractice case requires not expert testimony, and can go to the jury on the basis of res ipsa loquitur, based upon a common understanding among laypersons that the existence of femur fractures in this clinical setting gives rise to an inference of negligence.

A concise statement of the underlying facts and material proceedings in accordance with MCR 7.302(A)(1)(d) now follows.

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Underlying Facts

Austin Woodard was born on January 15, 1997. He was brought to the University of Michigan Hospital on January 30, 1997 (age 15 days), via EMS, after being seen by his pediatrician, Dr. Kennedy, with respiratory distress (Austin's oxygen saturation at Dr. Kennedy's office was noted to be extremely poor, at 70%). (Exhibit A) Austin was stabilized in the emergency department (where he was observed to be cyanotic, in significant respiratory distress[1]), and admitted to the PICU at Mott Children's Hospital, where he was diagnosed with RSV bronchiolitis. (Deposition of PICU attending, Dr. Joseph Custer, Exhibit B, p. 14) He remained hospitalized at Mott through February 28, 1997.

Within a few hours of admission, due to Austin's poor respiratory status, Dr. Custer intubated the patient. (Custer dep., pp. 15-16) Austin was, in essence, one very sick little child; he had a respiratory virus, which virulently impaired his ability to breathe and oxygenate. (Custer dep., pp. 15-16; Austin was a baby "so sick [that] he required mechanical ventilation . . . .")

Dr. Custer is Director of Pediatric Critical Care Medicine at Mott Children's Hospital. (Custer dep., pp. 3-4) He has been Director of Critical Care since 1985. (Custer dep., p. 4) Dr. Custer has three board certifications: pediatrics, pediatric critical care medicine and neonatology-perinatology. (Custer dep., p. 4) He is director of the

[1] Cyanosis is characterized by a bluish discoloration around the lips, due to inadequate oxygenation, and was noted in the record as one of the reasons why the patient was taken to see Dr. Kennedy on 1/30/97.

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fellowship training program in pediatric critical care medicine, and supervises physicians who work in the division of critical care medicine. (Custer dep., p. 5)

Austin came under the care of another PICU attending, Dr. Norma Maxvold, between January 30 and February 7, 1997. (Custer dep., pp. 16-17) On January 31, 1997, a right femoral line was inserted in the patient, without complication, and on February 2, 1997, a central venous catheter was placed in the left femoral vein, also without complication. (Defendant's Answer to Plaintiffs' Complaint, Exhibit C, p. 6, ¶ 7)

Austin's condition gradually improved, though the first effort to wean him from the ventilator failed, and Austin required re-intubation. (Casamassima dep., Exhibit D, p. 22) When Dr. Custer resumed care of the patient, the objective was to remove Austin from mechanical ventilation. (Custer dep., p. 17) Dr. Custer saw the patient daily after February 7, 1997, and as of February 9th, there was nothing out of the ordinary. (Custer dep., pp. 17-20) Austin remained on the ventilator, and the plan was to extubate. (Custer dep., p. 21) Austin was weaned from ventilatory support. (Custer dep., p. 21) The femoral lines had been removed; the removal was charted on February 7, 1997, (it is a minor procedure, usually done by the nurses). No peripheral lower extremity lines, according to the medical record, existed after February 7th. (Custer dep., p. 24)

To the delight of his caregivers, Austin progressed well. He came off the respirator on February 9, 1997, and was extubated. (Custer dep., p. 21)

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Shortly after Austin was transferred from the PICU, he exhibited problems; his left leg became swollen and painful to touch. (Custer dep., p. 30) The suspected and later confirmed cause was deep vein thrombosis (DVT). (Custer dep., p. 31) Austin's left leg was x-rayed on February 11, and it revealed a fracture at the lower end of the femur. (Exhibit E) A second fracture on the right extremity was revealed on February 13, per a radiology report. (Exhibit F) Because the fracture was consistent with potential abuse, Dr. Randall Loder (pediatric orthopedic surgeon) and Dr. Clyde Owings (who investigates all potential claims of child abuse as head of the Child Protection Team) were consulted. (See, Exhibit G; see also, Exhibit H, Owings Dep., pp. 8-9)

There was discussion during Dr. Loder's deposition about whether the fractures were "pathologic" (due to underlying disease), or "traumatic." (Loder dep., Exhibit I, pp. 13-16) A "pathologic" cause referred to something which weakens the bones, such as "[t]umors, infection, all kinds of multiple things." (Loder dep., p. 15) Trauma or injury is the more common cause; there was concern that these injuries were inflicted on Austin. (Loder dep., pp. 17-18)

In consultation with a radiologist, Dr. Loder concluded (based upon the fact that there had not been a lot of healing bone), that the fracture of the right femur had occurred within the past seven days or so. (Loder dep., pp. 11-12) By contrast, the fracture of the left femur was older: the x-ray (taken on 2/13/97) showed "hard callus," a sign of bone healing, which "usually takes 14 to 21 days to show up on the x-ray." (Loder dep., pp. 16, 34) Thus, the fracture of the left femur could have occurred up to one week ***prior*** to Austin's admission to the hospital. Although plaintiffs claimed that any existing fractures

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would have been diagnosed upon admission, both Dr. Loder and Dr. Owings testified that these types of fractures in an infant this age are exceedingly difficult to diagnose, because infants many times do not grimace, cry or otherwise convey to the examiner that anything is wrong. (Loder dep., p. 42; Owings dep., pp. 20-21) Moreover, there were no x-rays of the legs during the first week of the hospitalization.

Dr. Custer, the child's attending intensive care physician, never determined when the fractures occurred, and did not rule out the possibility that the infant already had the fractures when he was admitted to the hospital. (Custer dep., Ex. B, p. 34) Dr. Custer was concerned about the potential for child abuse (Custer dep., p. 35), and the legally mandated child abuse investigation was conducted by Dr. Owings.

Dr. Owings was consulted one or two days after the fractures were discovered. (Owings dep., p. 10) He reviewed the existing records, examined Austin and interviewed Austin's caregivers. (Owings dep., p. 10) He also reviewed the x-rays, [q]uite extensively." (Owings dep., p. 13) The skeletal survey of 2/13/97 showed:

- The left femur (described above by Dr. Loder as the fracture that might have occurred up to one week before Austin's admission), had a "moderately displaced linear fracture"; while
- The distal right femur had "periosteal reaction along the medial and lateral supracondylar region and irregular distal epiphyseal growth plate consistent with subchronic epiphyseal growth plate fracture." (Exhibit F)

What occurred on the left was a "classic metaphyseal" fracture, i.e., a real fracture. (Owings dep., pp. 21-22) On the right, was periosteal stripping, which "does not usually show up or is not evident with classic metaphyseal fractures" . . . and

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"can, by itself, be a physiologic occurrence in babies one, two, three months old." (Owings dep., p. 22) This means:

> ***"[The right femur] is not fractured. It's stripping the tough membrane on the outside of the bone away so there's membrane on the outside of the bone away so there's bleeding underneath the membrane. And new calcium gets formed inside the blood clot which is what gets read as callus."***

(Owings dep., p. 22, emphasis added) Dr. Owings does not recall any consensus among the radiologists regarding the age of the fractures; "[a]ging fractures is sort of like appraising art." (Owings dep. p. 34) Remotely the fracture on the left "could have been something as far back as delivery." (Owings dep., p. 33)

Although Dr. Owings' investigation did not reveal "reasonable cause" to report child abuse, he did not rule it out. (Owings dep., pp. 28-29)

Dr. Loder also testified that, although Dr. Owings' investigation could not rule out child abuse[2], there was insufficient evidence to conclude that child abuse occurred. (Loder dep., p. 22) There was also the potential for bone dysplasia. (Loder dep., p. 27) Although there was no evidence of this at the time, brittle bone disease (or osteogenesis imperfecta) is a clinical diagnosis that is made over time, as children grow. (Loder dep., p. 28)

[2] See, Exhibit Q, transcript of Motion hearing at pages 18-19, wherein defense counsel cites the trial court to Dr. Owing's deposition testimony, at page 37, indicating that Dr. Owings was unable to exclude child abuse as a possible cause of the fractures.

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Pre-Trial Proceedings

On October 4, 1999, plaintiffs filed their Complaint against the Regents of the University of Michigan in the Court of Claims, appending an Affidavit of Merit by Dr. Anthony Casamassima. (Exhibit J) The allegations set forth in Dr. Casamassima's affidavit relate to purported failures on the part of the PICU staff to:

- "Properly treat and monitor the infant Plaintiff with the degree of care required so as not to fracture Plaintiff's bones ***during insertion of arterial lines and femoral venous lines";***
- "Properly treat the infant Plaintiff with the degree of care required in the insertion of an arterial line so as not to subject Plaintiff to a loss of blood requiring transfusion";
- "Properly monitor the infant Plaintiff after placement of a femoral venous line and allowing him to lay on one side for over an hour subjecting Plaintiff to swelling and deep vein thrombosis . . ."; and
- "Properly monitor the infant Plaintiff after placement of a femoral venous line and arterial line, and after undergoing a blood transfusion, to prevent the onset of line sepsis, subsequent bacterial endocarditis and resultant septic emboli causing multiple cerebral infarctions".

(Exhibit J – Affidavit of Merit, emphasis added)

On October 7, 1999, plaintiffs filed the Washtenaw County Circuit Court Complaint naming Joseph R. Custer, M.D., Michael K. Lipscomb, M.D., Michele M. Nypaver, M.D. and Mona M. Riskalla, M.D. as defendants.[3] (Exhibit K) This Complaint, as well as the appended Affidavit of Merit by Dr. Casamassima, contained essentially the same allegations as those set forth in the Court of Claims case.

The two cases were consolidated under the Court of Claims Act (MCL 600.6421) before Washtenaw County Circuit Court Judge Timothy P. Connors.

[3] All defendants in the Circuit Court action except Dr. Custer were dismissed by stipulation.

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On or about February 7, 2000, defendants filed a Motion for Summary Disposition, arguing, inter alia, that Dr. Casamassima's affidavit did not meet the requirements of MCL 600.2912d, in that Dr. Casamassima had no training or experience in pediatric intensive care medicine, and therefore was not an expert who could be reasonably expected to satisfy the requirements of MCL 600.2169. (Exhibit L) A hearing on this motion was held on March 31, 2000. Judge Connors held that "the plain language of the statute indicates that specializations are to be taken into consideration but does not mention sub-specializations." (Exhibit M, T, 3/31/00, p. 12) He therefore concluded that, because the defendant physicians[4] and Dr. Casamassima "share[d] a board certified specialization in pediatrics", plaintiffs' counsel had reasonably believed that Dr. Casamassima met the requirements of MCL 600.2912d. (T, 3/31/00, p. 12)

At the request of defense counsel, Judge Connors clarified his ruling:

> MR. BOOTHMAN: . . . I would ask the Court make it clear, this Court is not ruling that he [Dr. Casamassima] is qualified to testify at trial against these defendants.
>
> THE COURT: All I'm ruling at this point is on the issue of the affidavit of merit. Obviously you'll be taking those issues up at a later time.(T, 3/31/00, pp. 12-13)

Thus, plaintiffs were on notice, from the first responsive pleading, that defendants would challenge Dr. Casamassima's qualification to testify as an expert witness at the time of trial.

[4] Dr. Nypaver, Dr. Lipscomb and Dr. Riskalla had not yet been dismissed. Dr. Nypaver was a specialist in pediatric emergency medicine. Dr. Lipscomb and Dr. Riskalla were residents. (Exhibit N)

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A voluminous amount of discovery was undertaken in the ensuing year and a half, including plaintiffs' depositions of Dr. Custer and a large number of physicians involved in Austin Woodard's care and treatment. The only independent (non-treating physician) expert listed on Plaintiffs' Witness List was Dr. Casamassima (Exhibit N), whose deposition went forward on August 10, 2001. (Exhibit D)

On or about August 30, 2001, defendants filed their Motion to Strike Dr. Casamassima as an Unqualified Expert. (Exhibit O)

At the hearing on this motion on September 14, 2001, defense counsel reminded Judge Connors of the earlier ruling on the Affidavit of Merit, noting that the court had specifically "reserved the issue of whether or not this expert would be qualified to testify at the time of trial." (Exhibit P, T, 9/14/01, p. 14) The time had come to decide that issue (trial was scheduled for December 17, 2001). Defense counsel argued that the legislature, while not pondering distinct and fine gradations of various specialties versus sub-specialties, clearly intended with MCL 600.2169 to "keep those who don't know what they are talking about from criticizing those in another field." (T, 9/14/01, p. 15) In this instance, ***during the time period at issue in this case,*** Dr. Casamassima had not set foot in any hospital, let alone a hospital containing a pediatric intensive care unit. (T, 9/14/01, p.15) Rather, he worked in a small facility for developmentally disabled youngsters. (T, 9/14/01, p. 15) He had no basis to offer testimony regarding the placement of central lines into the tiny vessels of a week old infant, or how intubation

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should have been done in this case, when he had not intubated an infant since his residency. (T, 9/14/01, pp. 15-16)

Plaintiffs' counsel responded by indicating that this is essentially a res ipsa loquitur case, based upon circumstantial evidence, and that Dr. Custer had conceded that these types of fractures do not occur during procedures (line placement and intubation). (T, 9/14/01, p. 18-19) Thus, counsel argued that these fractures do not occur in an infant this age in the first two weeks of an admission to the hospital, and Dr. Casamassima was "certainly qualified" to testify to that. (T, 9/14/01, p. 21)

The trial court held that MCL 600.2169 controls the determination of who may testify as an expert in this case. (T, 9/14/01, p. 29) The court found the following from Dr. Casamassima's testimony:

- Between December 1993 and March of 1998, none of Dr. Casamassima's clinical practice involved pediatric critical care medicine;
- Dr. Casamassima has no experience or training as an attending physician in a pediatric intensive care unit;
- He has no training in pediatric infectious disease or pediatric hematology;
- The last time he performed an intubation or placement of a central line was during his residency in the early 1980s;
- He became a full-time lawyer in March of 1998; and
- His pediatric practice contains approximately two days per week in the context of a home for mentally disabled children, in which he performs no work as an attending physician responsible for patient care. (T, 9/14/01, p. 30-31)

Considering this testimony, the court concluded that Dr. Casamassima "did not devote a majority of his time within the year preceding the injury to the same active clinical specialty as Dr. Custer or the staff of the pediatric intensive care unit." (T,

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9/14/01, p. 31) Dr. Casamassima "admitted" that he had "no experience" in pediatric critical care within one year prior to the injury complained of. (T, 9/14/01, p. 31) Thus, he was not qualified to testify under MCL 600.2169. (T, 9/14/01, p. 31) Because plaintiffs relied exclusively upon Dr. Casamassima to provide expert testimony, and now had no expert testimony with which to demonstrate violations of the standard of care on the part of Dr. Custer and the PICU staff, dismissal of all claims was appropriate. (T, 9/14/01, pp. 31-32)

Plaintiffs subsequently filed motions for leave to amend (to allege res ipsa loquitur), for extension of time to name a new expert, and for a determination as to the necessity of expert testimony. Oral arguments on these motions were heard on October 12, 2001, and the trial court indicated its intent to rule on the motions in a written opinion and order. (Exhibit Q, T, 10/12/01, p. 25)

In its Opinion and Order dated February 7, 2002 (Exhibit R), the trial court made the following rulings of law:

- Permitting an amendment to the complaints to assert ordinary negligence and/or res ipsa loquitur would be futile, because whether or not Austin Woodard's fractures could have occurred in the absence of negligence is one which must be supported by expert testimony (Opinion, pp. 4-5);
- Expert testimony would be required in order for plaintiffs to meet their burden of proof (because this case involves medical procedures, the understanding of which is outside the knowledge of a lay jury) as to whether these injuries could have occurred in the absence of someone's negligence requires expert testimony (Opinion, pp. 5-6); and
- Fairness did not require an extension of time to amend the plaintiffs' Witness List to name a new expert, where the case was over two years old, trial was scheduled two months hence, and plaintiffs had been placed on notice some eighteen months prior to the filing of defendants motion to strike, that defendants would challenge Dr. Casamassima's qualifications to testify.

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Accordingly, the court ordered that plaintiffs' various motions were denied, and that the case was dismissed, with prejudice. (Opinion and Order, 2/7/02) Plaintiff filed a timely Claims of Appeal on or about February 27, 2003.

Decision of the Court of Appeals

The three-member panel of the Court of Appeals did not agree on any single disposition of the two primary issues presented on appeal: 1) whether Dr. Casamassima was qualified to testify under MCL 600.2169, and 2) whether this case could be permitted to go to the jury, absent expert testimony, on the basis that a jury did not require expert testimony and could, under the facts of this case, "infer" negligence.

The three separate opinions are discussed below. Because the issue presented in this appeal regards the res ipsa loquitur issue, the emphasis in this brief is on that issue, though some reference to the issue of expert witness testimony is necessary.

Because defendants maintain that Judge Talbot's opinion correctly characterizes the record, and Judge Borrello's opinion does not, cross-references to the factual assertions set forth in both opinions and the record are provided in footnotes.

Opinion of Judge Talbot

Judge Talbot set forth the plaintiffs' burden of proof in a medical malpractice case, and discussed the limited exceptions to the requirement of expert testimony. (Talbot op., p. 6) There followed a painstaking examination of the record:

- Dr. Loder opined that the fractures were inflicted. (Talbot op., p. 6)[5] He concluded that the left leg fracture occurred within seven days of the 2/11/97 x-

[5] Reference to record: Loder dep., Ex. I, pp. 16-17.

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ray[6], which Judge Talbot observed "would place the injury during the infant's stay in the PICU." (Talbot op., p. 7) Dr. Loder also concluded that the fracture of the right leg occurred between fourteen to twenty-one days of the 2/13/97 skeletal survey[7], ***placing the injury "on the first day the infant was admitted to the PICU or any time during the preceding week or so."***

- Dr. Owings, on the other hand, concluded that the right leg was not fractured. (Talbot op., p. 7)[8] Dr. Owings believed that Austin had periosteal stripping in the right leg, and doubted that Dr. Loder had the capability professionally of diagnosing such a disease, which was not within the purview of Dr. Loder's specialty. (Talbot op., p. 7).[9] "Importantly, Dr. Owings opined that determining the age of the fractures was similar to that of appraising art, and he did not rule out the possibility that the fracture in the left leg could have been caused at the time of the infant's birth." (Talbot op., p. 7)[10]

- Dr. Custer "never determined when the fractures occurred," and "did not rule out the possibility that the infant already had the fractures when he was admitted to the hospital." (Talbot op., p. 7)[11] In a tiny infant, this diagnosis can be missed on physical examination, and Dr. Custer has missed it in the past, and a skeletal survey is used to make this diagnosis. (Talbot op., p. 7)[12] Dr. Loder's testimony supported this, in that he explained that it "was difficult to discover this type of fracture through a physical examination because some infants simply do not cry to notify the examiner of anything that may be wrong." (Talbot op., p. 7).[13] Dr. Owings also explained, "that the pain reaction of infants is considerably different than that of adults, and bone fractures of this sort were difficult to discover in an infant." (Talbot op., p. 7)[14]

- Thus, Judge Talbot concluded, even viewed in the light most favorable to plaintiffs, the testimony upon which they rely does not rule out the possibility that the fractures may have occurred before the infant was admitted to the hospital." (Talbot op., p. 7)

Judge Talbot maintained that the remaining requirements for imposition of "inferential" liability were not met:

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[6] Reference to record: Loder dep. Ex. I, pp. 11-12.
[7] Reference to record: Loder dep. Ex. I, p. 16.
[8] Reference to record: Owings dep., Ex. H, pp.21-22.
[9] Reference to record: Owings dep., Ex. H, pp. 22-23.
[10] Reference to record: Owings dep., Ex. H, pp. 33-34.
[11] Reference to record: Custer dep., Ex. B, p. 34.
[12] Reference to record: Custer dep., Ex. B, pp. 34-35.
[13] Reference to record: Loder dep., Ex. I, p. 42. Dr. Owings offered a similar opinion (Owings dep. Ex. H, pp. 20-21)
[14] Reference to record: Owings dep., Ex. H, p. 32.

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- The possibility of a pathological cause was not ruled out. Dr. Custer did not rule it out, and Dr. Owings determined that Austin has common forms of osteogenesis imperfecta (brittle bone disease), but he left definitive diagnosis to other specialists.[15] Dr. Loder, referring to the examination of a consultant, Dr. Innis,[16] indicated a clinical diagnosis of osteogenesis imperfecta, requiring future monitoring of the patient's growth;

- "Contrary to plaintiff's assertions," child abuse had not been ruled out as a potential cause of the fractures. Both Dr. Custer[17] and Dr. Loder[18] "never formulated an opinion whether the fractures were caused a result of child abuse, while, on the other hand, Dr. Owings, in charge of the child abuse investigation, did not rule out child abuse as a cause of the fractures.[19]

- Because child abuse was not ruled out, the claim that "child abuse was ruled out in this case is without merit." (Talbot op., p. 8)

Given the failure of plaintiffs to show that the fractures occurred in the PICU, the plaintiffs failed to demonstrate that the defendants "caused the injuries or that the injuries were of a kind that ordinarily do not occur in the absence of someone's negligence to satisfy the doctrine of res ipsa loquitur." (Talbot op., p. 8)

Judge Talbot also concluded that plaintiffs "failed to show that the fractures were caused by an agency or instrumentality within the exclusive control of defendants . . . " (Talbot op., p. 8) Even assuming that the fractures occurred in the PICU, the "proofs established that persons other than medical staff had access to the infant, including his parents[20], grandmother[21], and the parent of the child with whom the infant shared a hospital room."[22] (Talbot op., p. 8)

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[15] Reference to record: Owings dep., Ex. H., p. 26.
[16] Reference to record: Loder dep., Ex. I, p. 28.
[17] Reference to record: Custer dep., Ex. B p. 35
[18] Reference to record: Loder dep., Ex. I, p.20.
[19] Reference to record: Owings dep., Ex. H, p. 29.
[20] Reference to the record: Joanna Woodard dep., Ex. S, p. 10.
[21] Reference to the record: Joanna Woodard dep., Ex. S, p. 10.
[22] Reference to the record: Kendra Reynolds dep., Ex. T, p. 10.

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Because these multiple people had access to the minor plaintiff, Judge Talbot concluded that plaintiffs had failed to show that the fractures were caused by an agency or instrumentality within the exclusive control of defendants, a prerequisite for imposition of liability on the basis of res ipsa loquitur. (Talbot op., p. 8) Even assuming the fractures occurred during the hospitalization, by the admission of plaintiffs and their relatives themselves, the hospital did not have exclusive control or access.

Plaintiffs also failed to demonstrate that the injuries were of a type that do not occur in the absence of malpractice. There was an "extensive medical investigation into the matter, involving experts from at least three different medical fields, [which was] inconclusive." (Talbot op., p. 8) On this record, it cannot be said that "the evidence of the true explanation of the event was more readily accessible to defendants than to plaintiffs," another required element to invoke the res ipsa doctrine. (Talbot op., p. 8)

Finally, Judge Talbot addressed plaintiffs' argument that expert testimony in this case is not required because the alleged malpractice is a matter of "common knowledge and observation" on the part of a potential jury:

> "Expert testimony may not be required when 'the lack of professional care is so manifest that it would be within the common knowledge and experience of the ordinary layman that the conduct was careless... Assuming that the injuries were sustained during the infant's stay at the PICU, there is nothing whatsoever on this record to indicate that the fractures were cause by the manner in which the infant was handled and maneuvered, as plaintiffs claim. Such treatment included muscle relaxants[23] and strong sedatives[24], mechanical ventilation and intubation[25],

[23] Reference to the record: Custer dep., Ex. B, p. 47.
[24] Reference to the record: Custer dep., Ex. B. p. 47.
[25] Reference to the record: Custer dep., Ex. B, pp. 15-16.

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> a feeding tube[26], and the placement of an arterial line in the femoral vein of the infant's right leg[27] and a venous catheter inserted in the infant's left leg[28]. Accordingly, the trial court did not err in finding that the procedures the infant underwent were not within the common knowledge of a reasonably prudent factfinder *(sic)*. Assuming that the fractures may have been caused by the placement of the lines in the infant's legs, the risks associated with the placement of arterial lines or venous catheters in a newborn infant, and whether fractures ordinarily do not occur in the absence of negligence, are not within common knowledge of a reasonably prudent fact finder."

(Talbot op., p. 9)

Opinion of Judge Borrello

Judge Borrello dissented from Judge Talbot' opinion. (Borrello op., p. 1) He dissented from the view of his appellate colleagues that Dr. Casamassima was unqualified to testify in this case. Judge Borrello characterized the issues on appeal as follows: "was plaintiffs' expert qualified to testify, and is expert testimony necessary in a case where an infant is taken to a hospital for treatment of RSV bronchiolitis and somehow develops two broken femurs?" (Borrello op., p. 2)

Citing this Court's 1874 opinion in *People v. Morrigan,* 29 Mich. 4, 9 (1874), Judge Borrello opined that "[o]ur Courts have long harbored suspicion about the necessity of experts and their true value to juries." (Borrello opinion, p. 4) Despite "years of warnings from our courts, our Legislature, by enacting MCL 600.2169, necessitated the use of expert witnesses in medical malpractice cases in all but a limited number of instances." In the instant case, in response to plaintiffs' argument that a jury could infer negligence in the absence of expert testimony, the trial court held that expert

[26] Reference to the record: Joanna Woodard dep., Ex S, p. 22.
[27] Reference to the record: Complaint, p. 4, ¶ 16.
[28] Reference to the record: Complaint, p. 4, ¶ 16.

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testimony was required, holding that the case involved "medical procedures and the application of those procedures, which information is not within the common knowledge and observation of a reasonably prudent jury." (Borrello op., p. 4)

Judge Borrello cited "two relevant exceptions" to the "general rule" that expert testimony is required in medical malpractice cases:

- Where the negligence complained of is "a matter of common knowledge and observation, no expert testimony is required"; and
- Where the elements of res ipsa loquitur are satisfied, negligence can be inferred. (Borrello op., p. 5)

Additionally, expert testimony is "not needed in cases where the lack of professional care is so manifest or egregious that a layman could determine the issue of negligence by resorting to common knowledge and experience." (Borrello op., p. 5) Citing a number of cases involving acts which were "careless and not in accord with standards of practice in the community," Judge Borrello found that "where a child presented to the hospital for RSV bronchiolitis and developed two broken femurs, the doctrine of res ipsa loquitur applies and expert testimony is unnecessary." (Borrello op., p. 6)

Judge Borrello, viewing the evidence in the light most favorable to the plaintiffs, and claiming that defendants presented "no contrary evidence,"[29] concluded "the inference must be granted to plaintiffs that Austin's femurs were healthy at the time of

[29] This is false and an affront to Judge Borrello's appellate colleague. Defendants presented much evidence demonstrating that the femur fractures may well have existed prior to Austin Woodard's admission to Mott; Judge Borrello elected to ignore that evidence in his written his opinion. The fact that Judge Borrello styled his "opinion" as a dissent to Judge Talbot's opinion suggests that Judge Borrello at least read Judge Talbot's opinion, though this is by no means certain. Judge Borrello's opinion ignores entirely the evidence that the fractures may have occurred prior to Austin's admission.

admission." (Borrello op., p. 6) He found "analogous" this court's decision in *Higdon v. Carlebach,* 348 Mich. 363, 83 N.W.2d 296 (1957), involving circumstances in which a dentist's drill slipped and cut a patient's tongue. *Higdon* held, according to Judge Borrello, that "lay proof" may give rise to an inference of negligence where "healthy and undiseased parts of the body requiring no treatment are injured during the professional relationship, under circumstances where negligence may legitimately be inferred." (Borrello op., p. 6) This led Judge Borrello to his ultimate conclusion:

> In this case, Austin presented to the hospital to be treated for RSV bronchiolitis and subsequently sustained two broken femurs. A lay person can understand that RSV bronchiolitis is not connected to broken femurs and can infer negligence. Expert testimony is not necessary when an injury occurs to a healthy and undiseased body part that did not require treatment. *Higdon, supra* at 374-376. Viewing the evidence in the light most favorable to the nonmoving party, Austin's injuries were to parts of his body which at the time of admission we must infer were healthy and undiseased. I therefore find our Supreme Court's ruling in *Higdon* controlling. Accordingly, the trial court erred when it held that expert testimony was required. (Borrello op., p 6).

Finally, Judge Borrello held that the trial court abused its discretion in denying plaintiffs' motion to amend their complaint, because the ruling was based upon the "faulty premise" that plaintiffs needed to produce expert testimony to make out their claims against defendants. (Borrello op., p. 7)

Opinion of Judge Meter

Judge Meter agreed with Judge Talbot that Dr. Casamassima was unqualified to testify as an expert witness. (Meter op., p. 2) He agreed with Judge Borrello's analysis of the res ipsa loquitur issue. (Meter op., p. 2) Judge Meter felt the issue of amending the

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complaint was moot, because the doctrine of res ipsa loquitur provided plaintiffs with the means to prove the allegations in their original complaint. (Meter op., p. 2)

The trial court's ruling was therefore affirmed in part, reversed in part and remanded for trial. (Meter op., p. 2)

It is from the reversal of Judge Connors' ruling on the issue of res ipsa loquitur, and the order remanding this case for trial, that defendants now seek leave to appeal.

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ARGUMENT

I. PLAINTIFFS CLAIM THAT THE DIAGNOSIS OF FEMUR FRACTURES DURING AUSTIN WOODARD'S ADMISSION TO MOTT CHILDRENS' HOSPITAL SHOULD GIVE RISE TO AN INFERENCE OF NEGLIGENCE. ABSENT PROOFS AS TO WHEN THE FRACTURES OCCURRED, OR EXPERT TESTIMONY INDICATING THAT THE FRACTURES WERE THE RESULT OF ANY ACT OR OMISSION ON THE PART OF DEFENDANTS, THERE IS NO LIABILITY ON THE PART OF DEFENDANTS FOR MEDICAL MALPRACTICE. THE MERE EXISTENCE OF AN ALLEGED INJURY DOES NOT GIVE RISE TO AN INFERENCE OF NEGLIGENCE.

Standard of Review

This Court reviews a summary disposition ruling *de novo. Spiek v. Dep't of Transportation,* 456 Mich. 331, 337, 572 N.W.2d 201 (1998).

Discussion:

Unless one shares a radical agenda to dramatically expand medical malpractice liability in the State of Michigan, reading Judge Borrello's majority opinion on the issues of expert witness testimony and res ipsa loquitur will produce consternation and, in some cases, audible gasps. Judge Borrello may be right that a dentist who drills into a patient's tongue, or a physician who severely lacerates a patient's leg while removing a cast with a cutting wheel, should have no cause to complain if a jury is permitted to conclude negligence without the benefit of expert testimony. These and similar observations about "obvious" malpractice and inferences of negligence simply have no application to the facts of this case. To allow this decision to stand is to permit a jury to impose liability on the basis of nothing more than the fact that this infant was diagnosed

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with femur fractures while he was hospitalized, without any reasonable basis for a jury to conclude that the fractures were due to any act, negligent or otherwise, on the part of the hospital staff. The decision should be reversed.

No one knows the cause of Austin Woodard's femur fractures, and plaintiffs have no expert or other testimony to suggest that the fractures occurred as a result of any act or omission on the part of Austin's care givers at Mott Children's Hospital. Washtenaw County Circuit Court Judge Timothy Connors therefore appropriately dismissed this claim on the basis that plaintiffs could not meet their burden of proof under MCL 600.2912a. The opinion of Judge Michael Talbot, reflecting a meticulous scrutiny of the record and sound legal analysis, correctly held that Judge Connors' decision should be affirmed.

Judge Borrello concluded (in an opinion joined by Judge Patrick Meter), that the absence of proofs regarding the cause or causes of the femur fractures, and who caused them, is superfluous, of no moment, and certainly no barrier to allowing a jury to impose liability upon the defendants. The mere fact of a diagnosis of femur fractures in an infant admitted for treatment of a respiratory disease (regardless of when or how they occurred, or at whose hand) is sufficient to submit the case to a jury. Issues of metabolic bone disorders, osteogenesis imperfecta, or other potential causes for the fractures ***not*** attributable to any negligence on the part of defendants, are well within the purview of a lay jury, according to Judge Borrello, who plainly has no use for expert testimony in medical malpractice cases involving even the most highly specialized areas of medicine. A lay jury, he says, well knows that "RSV bronchiolitis is not connected to broken femurs." This is the actual extent of the analysis: ***injury alone alleged but not shown to***

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be due to negligence on the part of the defendants, allows a jury to infer negligence and impose liability.

It is telling that Judge Borrello needed to reach back to horse-and-buggy days, when ice was delivered in large blocks, before automobiles or refrigerators existed, to find appellate authority for the proposition that expert testimony is suspect and untrustworthy. In the modern world, regarding highly specialized fields of medicine, few would doubt that issues of proper care and treatment of pediatric intensive care patients are beyond the "common, ordinary" experience of jurors.

Nonetheless, in his opinion regarding res ipsa loquitur (joined by Judge Meter), Judge Borrello holds that expert testimony in this field (pediatric intensive care medicine) has no, or at least, highly questionable "value." (Borrello op., p. 4, citing *People v. Morrigan,* 29 Mich. 4, 7 (1874))

To members of the Bar who specialize in this field, such an assertion is a wild departure from prior, contemporary decisions of this Court. To physicians, who expend extra years of training in fellowships in highly specialized areas of medicine, Judge Borrello's opinion is simply incomprehensible.

The "General Rule," Which Has Very Limited Exceptions, Is That Expert Testimony Is Required (Particularly In Highly Specialized Areas Of Medicine) To Establish a Prima Facie Case of Medical Malpractice

In order to sustain a claim for medical malpractice, plaintiffs have the burden of proving four elements: 1) the applicable standard of care; 2) a breach of the standard of care; 3) injury; and 4) that the injury was caused by the negligence of defendant in breaching the standard of care. MCL 600.2912a; *Weymers v. Khera,* 454 Mich. 639, 655, 563 N.W.2d 547 (1997). In a medical malpractice action, expert testimony is

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required to establish the existence of both a breach of the standard of practice and causation, because the scientific knowledge necessary to determine whether an injury is truly attributable to something a medical professional did or failed to do is generally not within the common understanding of a reasonable jury. *Locke v. Pachtman,* 446 Mich. 216, 223, 231-233, 521 N.W.2d 786 (1994); *Ghezzi v. Holly,* 22 Mich. App. 157, 163, 177 N.W.2d 247 (1970). Only in rare circumstances, where malpractice is obvious and the matter is within the "common knowledge" of a lay jury, no expert testimony is required. *Id.*

Judge Borrello has a different view of expert testimony in malpractice cases, one completely at odds with established case law.

"Our Courts," according to Judge Borrello, have "long harbored suspicion about the necessity of experts and their true value to juries." (citing, *Higdon v. Carlebach,* 348 Mich. 363, 374, 83 N.W.2d 296 (1957)). ***Judge Borrello goes on to state that "[d]espite years of warnings from our Courts, our Legislature, by enacting MCL 600.2169, necessitated the use of expert witnesses in medical malpractice cases in all but a limited number of instances.***" (Borrello op., p. 4, emphasis added).

Recent appellate decisions by this Court belie Judge Borrello's assertion of an appellate aversion or hostility to, or "warning" to the Legislature about, expert testimony in medical malpractice cases. This Court has disproved the notion that a negative result should give rise to an "inference" of negligence, dispensing with the need for expert testimony. *Wilson v. Stilwill, supra,* 411 Mich. 587, 309 N.W.2d 898 (1981) (mere occurrence of a post-operative infection is not a situation which gives rise to an inference of negligence when no more has been shown than the facts that an infection

has occurred and the infection is rare); *Paul v. Lee,* 455 Mich. 204, 216-217, 568 N.W.2d 510 (1997) (emphasizing "the danger of allowing a malpractice claim to go to the jury when it is unsupported by expert testimony"); *Jones v. Porretta,* 428 Mich. 132, 150-151, 405 N.W.2d 863 (1987) (application of the rule of res ipsa loquitur is limited in malpractice cases; because a jury "often cannot rely on its own experience in [malpractice] cases, expert evidence must usually be presented.")

Judge Borrello's claim that this Court has "warned" the Michigan Legislature against passage of any law supporting any requirement of expert testimony is baffling, in view of recent decisions. In *Scarsella v. Pollack,* 461 Mich. 547, 607 N.W.2d 711 (2000), this Court held:

> [T]he statute [MCL 600.2169] 'reflects a careful legislative balancing of policy considerations about the importance of the medical profession to the people of Michigan, the economic viability of medical specialists, the social costs of 'defensive medicine,' the availability and affordability of medical care and health insurance, the allocation of risks, the costs of malpractice insurance, and manifold other factors, including, no doubt, political factors – all matters well beyond the competence of the judiciary to reevaluate as justiciable issues. [Citing Judge Taylor's dissent in the Court of Appeals decision in *McDougall*, 218 Mich. App. 518.] 461 Mich. at 35.

Requiring that expert witnesses actually practice the same specialty as the defendant will, the Court held, "protect the integrity of our judicial system by requiring real experts instead of 'hired guns'", and ensure that proof of malpractice "emanate from sources of reliable character as defined by the legislature." *Id.* at 36.

Clearly, this Court does not view its role as discouraging or "warning" the Michigan Legislature that expert testimony in medical malpractice cases is "suspicious"

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and disfavored.[30] Judge Borrello's assertion that Michigan courts look with a jaundiced eye upon any requirement for expert testimony in medical malpractice cases constitutes either a misreading of the law, or a reflection of a personal belief that is contrary to Michigan law. Either way, Judge Borrello's decision should be reversed.

"Obvious and Manifest" Negligence and the Elements of Res Ipsa Loquitur

Judge Borrello devotes most of his opinion to arguing that negligence in this case is so "obvious and manifest" that expert testimony is not required. This is juxtaposed with reference to res ipsa loquitur that Judge Borrello maintains, under these facts, gives rise to a permissible inference of negligence by the jury, without the benefit of expert testimony. The elements of res ipsa loquitur have been set forth in prior opinions of this Court:

- The event must be of a kind which ordinarily does not occur in the absence of someone's negligence;
- It must be caused by an agency or instrumentality within the exclusive control of the defendant;
- It must not have been due to any voluntary action or contribution on the part of the plaintiff; and
- Evidence of the true explanation of the event must be more readily accessible to the defendant than to the plaintiff.

[30] A more accurate view of this Court's decisions over the years (and Judge Borrello reaches farther back for support for his views than is common in contemporary appellate decisions), is that this Court has always held that expert testimony is required in malpractice cases, and that cases of "obvious or manifest" negligence, which do not require expert testimony, are relatively rare. Those cases are cited elsewhere in this brief.

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Wischmeyer v. Schanz, 449 Mich. 469, 484, 536 N.W.2d 760 (1995); *Locke v. Pachtman,* 446 Mich. 216, 521 N.W.2d 786 (1994); *Jones v. Porretta, supra.* This Court has previously held that ***the first issue***, whether or not the event is "of a kind which does not ordinarily occur in the absence of someone's negligence," must be proved by expert testimony, unless it involves a matter "within the common understanding of the jury." *Locke, supra,* 446 Mich. at 231; See also, *Wilson v. Stilwill,* 411 Mich. 587, 309 N.W.2d 898 (1981). Otherwise, this Court has held that expert testimony in medical malpractice cases is required. Id.

In *Jones, supra,* this Court held that "the major purpose of the doctrine of res ipsa loquitur is to create at least a presumption of negligence when the plaintiff is unable to prove the actual occurrence of a negligent act." Id., 428 Mich. at 150. See also, *Cloverleaf Car Co. v. Phillips Petroleum Co.,* 213 Mich. App. 186, 194, 540 N.W.2d 297 (1995) In order for such a presumption to arise, however, a plaintiff must also show that the injury was caused by the defendant, or by an agency or instrumentality within the defendant's control. *Jones, supra; Wischmeyer, supra.* No Michigan appellate court, however, has held, prior to the decision of Judge Borrello and Judge Meter, that a medical malpractice case may go to the jury with 1) no expert testimony, 2) no proof as to the manner in which the injury occurred, and 3) no proof that the defendants, or an agency or instrumentality within their control, caused the injury.

In all of the reported cases cited by Judge Borrello in which Michigan appellate courts have determined that negligence was "within the common understanding of the jury," there was never any doubt that the defendant(s) caused the injury. See, *Roberts v. Young,* 369 Mich. 133, 138, 119 N.W.2d 627 (1963) (if defendant leaves a foreign

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object within the patient's body following a medical procedure, the jury may infer negligence); *Murphy v. Sobel,* 66 Mich. App. 122, 124, 238 N.W.2d 547 (1975) (defendant physician admitted having made incision into the median nerve, rather than into the plameris longus tendon, but immediately repaired the nerve and denied violating the standard of practice); *Burton v. Smith,* 34 Mich. App. 270, 274, 191 N.W.2d 77 (1971) (whether defendant complied with standard of care in performing surgery to remove a spermatocele held to require expert testimony); *Haase v. DePree,* 3 Mich. App. 337, 340, 346-347, 142 N.W.2d 486 (1966) (defendant surgeon performed thoracic aortogram causing loss of circulation to patient's right arm and resultant amputation; held case could not properly go to the jury on res ipsa loquitur or inference of negligence); *Taylor v. Milton,* 353 Mich. 421, 92 N.W.2d 57 (1958) (filiform on catheter introduced into the patient's urethra by defendant broke off and lodged in patient's bladder; trial court ruled that defendant was not negligent in performing procedure, but submitted the case to the jury on the question of whether defendant concealed his knowledge that filiform passed into bladder); *Higdon v. Carlebach,* 348 Mich. 363, 83 N.W.2d 296 (1957) (defendant dentist drilled into patient's tongue); *Whinchester v. Chabut,* 321 Mich. 114, 32 N.W.2d 358 (1948) (defendant surgeon allegedly left cotton gauze surgical sponge in incision site during open reduction of femur fracture); *LeFaive v. Asselin,* 235 Mich. 443, 446, 247 N.W.2d 911 (1933) (defendant surgeon admitted leaving curved surgical needle in patient's abdomen following appendectomy procedure).

Judge Borrello cites *Higdon v. Carlebach, supra,* as the "controlling authority" in this case, indicating that "our Supreme Court held that a jury may infer negligence from 'lay proof' in cases where 'healthy and undiseased parts of the body requiring no

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treatment are injured during the professional relationship, under circumstances where negligence may legitimately be inferred.'" (Borrello op., p. 6) Judge Borrello went on to conclude that this case presents one of those "circumstances," because "[a] lay person can understand that RSV bronchiolitis is not connected to broken femurs and can infer negligence." *Id.*

The analysis, however, is not so simple. First, in *Higdon,* the "lay proof" from which this Court held that a jury could infer negligence was the testimony of the plaintiff that, while performing dental work, the defendant's drill slipped and defendant drilled into her tongue. *Higdon, supra,* 348 Mich. at 365-366, 375. This of course was direct evidence as to 1) how the injury occurred, and 2) who caused the injury. Expert testimony was not deemed necessary for a jury to conclude that, in performing dental work, a dentist should not drill into the patient's "healthy and undiseased" tongue. In the instant case, there is a complete absence of any "lay testimony" as to 1) how Austin's fractures occurred, and 2) who, or what instrumentality, caused them. There is nothing from which a jury could infer anything; a jury, rather, would be left merely to speculate.

Second, the analysis that treatment of "RSV bronchiolitis is not connected to broken femurs" is deeply flawed, and betrays a lack of comprehension regarding pediatric intensive care medicine. Judge Borrello, with his disdain for expert testimony, may not have observed that plaintiffs' own expert, albeit unqualified, initiated this lawsuit with an affidavit claiming that placement of the arterial line and venous catheter may have caused the fractures. (Exhibit J) Thus, as Judge Talbot observed,

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"[w]hile the legs may have required no treatment, their use was necessary for the treatment of the diseased parts of the infant's body." (Talbot op., p. 9)

Thus, *Higdon* is not the controlling authority. Moreover, because Dr. Casamassima is not qualified to testify, there would be no expert testimony to suggest ***any*** potential cause of the fractures connected with the patient's medical care. There would not be ***any*** testimony of any kind to establish that the fractures were caused by any of the patient's medical care providers. Again, the jury would be left to guess regarding how or by whom the fractures were caused.

From the above cited, multiple authorities, it follows that an "inference" of negligence is allowable only when there is no question but that the injury was caused by the defendant.

Here, the cause of the fractures is unknown, and Judge Borrello argument for an "inference" of negligence is in no way justified, because there is no proof as to how the injury occurred (expert testimony or otherwise), and thus no basis to argue that this was "obvious" negligence, well within the purview of a jury.

At most, plaintiffs would ask a jury to "infer" that the fracture occurred in some fashion by the "handling or maneuvering" of Austin during his treatment. That treatment involved, as Judge Talbot observed, "muscle relaxants and strong sedatives, mechanical ventilation and intubation, a feeding tube, and the placement of an arterial line in the femoral vein of the infant's right leg and a venous catheter inserted into the patient's left leg." Plainly, all of this is well beyond the capacity of a lay jury to evaluate, in the absence of expert testimony. Judge Connors was correct to hold that this

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case could not properly go to a jury without the benefit of expert testimony, and that ruling should be reinstated.

Judge Talbot's Opinion Is Correct That The Elements of Res Ipsa Have Not Been Satisfied

The first factor that must be established before a case can be submitted to a jury under a res ipsa loquitur theory is that the injury is one that "does not ordinarily occur in the absence of negligence." *Locke, supra,* at 231. Judge Connors concluded, correctly, that this element cannot be satisfied in the absence of expert testimony. As noted above, there is no lay testimony to establish the cause of the fractures, let alone "to rule out the possibility that the fractures were caused as risks arising from the types of procedures performed in the PICU." (Talbot op., p. 7)

In Judge Talbot's opinion, neither a pathologic cause nor child abuse was ruled out as possible causes of the fractures. Moreover, it was not established that the fractures occurred during the hospitalization. Thus, plaintiffs cannot rely upon the adverse testimony of Dr. Custer, Dr. Loder or Dr. Owings to establish that these injuries "do not ordinarily occur in the absence of negligence."

The second required factor, that the fractures were caused by an agency or instrumentality within the exclusive control of the defendants, couldn't be satisfied. Again, plaintiffs have not shown that the fractures actually occurred during the hospitalization. Even assuming that they did, the record clearly establishes that individuals other than the medical staff had ready access to the infant, including the parents, a grandmother, and Kendra Reynolds, whose child shared the PICU with Austin. Ms. Reynolds testified that she could come and go freely in this room. (Reynolds dep., p. 10) A reading of Ms. Woodard's deposition (Exhibit S) demonstrates

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that she was there daily, as she was later when the fractures were diagnosed. (Loder dep., p. 33) Although plaintiffs sought below to suggest that their access to Austin was limited due to lines and other medical devices, Ms. Woodard testified that she changed the infant's diapers during the stay in the PICU. (Woodard dep., pp. 35-36) Clearly, Austin was not under the "exclusive control" of the defendants.

The third factor, that the injuries not be due to any voluntary action or contribution by the plaintiffs, has also not been established. The record demonstrates that the fractures may have occurred before the hospitalization, and the parents had access to the infant during his stay in the PICU.

The fourth factor, that the true explanation for the injury is more readily accessible to defendants than plaintiffs, is also not met. The assumption underlying plaintiffs' claim that defendants are in a better position to know how the fractures occurred is that someone on the medical staff caused the fractures, and that assumption is baseless. An extensive investigation was conducted following the diagnosis of these fractures and the results were, as Judge Talbot observed, "inconclusive." (Talbot op., p. 8)

The ruling by Judge Borrello and Judge Meter that the facts of this case warrant submission to a jury with an instruction on res ipsa loquitur is clearly erroneous, and should be reversed.

Conclusion

Because there is no reasonable basis for the jury to "infer" negligence on the part of the defendants, Judge Connors was absolutely right to grant summary disposition. That decision should not have been disturbed, and the decision by Judge Borrello and

Judge Meter to remand this case for trial without expert testimony should be reversed. In *Skinner v. Square D Co.,* 445 Mich. 153, 516 N.W.2d 475(1994), this Court held that there "must be substantial evidence which warrants a reasonable basis for the inference of negligence . . . . [w]e cannot permit the jury to guess." *Id*, 445 Mich. at 165-166.

Should this case be remanded for trial, there would be no reasonable basis for an inference of negligence, and "guessing" would be all that a jury would be in a position to do.

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RELIEF REQUESTED

Defendants-Appellants respectfully request that this Court grant the within Application for Leave to Appeal; or in the alternative, enter its Order reversing the decision of the Court of Appeals to remand this case for trial, and reinstate the Washtenaw County Circuit Court's grant of Summary Disposition.

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